SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 27 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. — 1017

UNITED STATES OF AMERICA,

Appellant,

v.

MARSHALL & ILSLEY BANK STOCK CORPORATION, MARSHALL & ILSLEY BANK, NORTHERN BANK and the BANK OF COMMERCE,

Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move this Court to dismiss the above entitled appeal or affirm the judgment of dismissal entered on June 15, 1966 in the above entitled action, which involved only Section 7 of the Clayton Act. The opinion of the United States District Court for the Eastern District of Wisconsin is set forth in the Government's "Jurisdictional Statement" and is reported in 255 F. Supp. commencing at page 273.

QUESTION PRESENTED

In its Notice of Appeal, as compared to the "Question Presented" set forth on page 2 of its Jurisdictional Statement (hereinafter referred to as JS p. .....), it is stated:

> "The question presented by this appeal is:
>
> Whether the Bank Holding Company Act, previous to its amendment in 1966, deprived the district courts of jurisdiction over suits by the United States under Section 15 of the Clayton Act challenging under Section 7 thereof bank holding company acquisitions approved by the Federal Reserve Board?"

ARGUMENT

1. This appeal was taken pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 USC 29. This Court held in *Shenandoah Valley Broadcasting, Inc. v. American Society of Composers, Authors and Publishers,* 375 U.S. 39 (1963), at page 40, in respect to said Expediting Act:

> "The purpose of the Act is to expedite litigation of 'great and general importance' where the Government is the aggrieved party. See 36 Cong. Rec. 1679 (1903)".

Conclusive as to whether this litigation is of "great importance", are the following circumstances:

> (a) the concession by the Government (JS p. 13) that "* * * this is the only pending antitrust suit attacking acquisitions by a bank holding company * * *" and that "* * * the legal issue presented here may be of limited importance";

(b) the Congressional validation as to the Clayton Act by the enactment of the 1966 amendments to the Bank Holding Company Act of 1956 of *all bank stock acquisitions consummated prior to July 1, 1966, except those of Appellees,* i.e., all bank stock acquisitions

> "consummated at any time *prior or subsequent* to May 9, 1956, and *as to which no litigation was initiated* by the Attorney General *prior to the date of the enactment of this amendment* shall be *conclusively* presumed not to have been in violation of any antitrust laws other than * * * *" Section 2 of the Sherman Antitrust Act. (Section 11(d) JS p. 54a). (Italics added)

(c) the promulgation by the Congress of a new substantive rule of law governing the Federal Reserve Board (Board) in its determination as to the legality under the Clayton Act of a proposed bank stock acquisition after July 1, 1966 (Subsection (c) of Section 3 of the Bank Holding Company Act of 1956 as amended; JS p. 52a). This rule is also made binding upon the courts which are vested with the jurisdiction to *"review de novo"* Board decisions approving bank stock acquisitions. (Section 11(b) of the Bank Holding Company Act as amended; JS p. 53a.)

(d) the Government asserts at JS p. 13 that, while "the legal issue presented here may be of limited importance", the litigation is however "of substantial significance because it affects an influential industry in one of the nation's large metropolitan centers."

The Government supports this claim only by repeated reference to the Milwaukee banking concentration.

Absent a claim that the banking concentration in Milwaukee is the highest or almost the highest, among comparable areas, the Government's allegations as to concentration are not probative as to this litigation being of "great and general importance". Data as to banking concentration in other comparable areas of the United States based on deposits was attached to the Appellees' Answer as Exhibit B and was received in evidence as Exhibit 77. (Tr. 227-8)

The City of Milwaukee had a 1960 census population of 741,324. Banking concentration on the basis of the three largest banks and of the four largest banks in twelve cities in the 500,000 to 900,000 population range, and in the counties in which said cities are located, was taken (except population data) from Polk's Bank Directory of March, 1960. (Government figures in the Complaint also correspond to those in Polk's Bank Directory.) On this basis, in respect to total deposits as of December 31, 1959, the banking concentrations of the City and County of Milwaukee as compared with such other cities and counties were as follows:

	Percentage of Total Deposits — Three Largest Banks		Percentage of Total Deposits — Four Largest Banks	
Cities	City	County	City	County
Boston	83.0	82.4	91.0	90.3
Buffalo	96.7	91.6	99.4	94.1
Cincinnati	84.8	81.4	96.9	93.1
Cleveland	78.7	78.7	90.3	90.3
Dallas	83.6	81.0	87.3	84.7
Milwaukee	76.6[a]	68.1[b]	80.3[c]	71.4[d]
New Orleans	83.4	83.4	94.5	94.5
Pittsburgh	92.3	81.7	96.1	85.7
St. Louis	62.2	51.5	67.6	56.0
San Antonio	67.5	66.9	73.1	72.5
Seattle	88.3	86.9	96.5	95.0
Washington, DC	74.4	—	82.3	—

[a]Ninth [b]Ninth [c]Tenth [d]Eleventh

Substantially the same standing for Milwaukee is shown, based on assets, in Exhibit A of Appellees' Answer, received as Exhibit 76 at the trial, and based on loans and discounts in Exhibit C of Appellees' Answer, received as Exhibit 78 at the trial. (Tr. pp. 227-8)

Manifestly the low standing of the banking concentration in Milwaukee does not *ipso facto* support a contention that this litigation is of great or of general importance. While said relative standing might not be material on the merits, it is relevant and critical on a motion to dismiss the appeal because the litigation is not of "great or general importance".

A reversal of the trial court's decision would have no general or prospective effect. The bank stock acquisitions by Marshall & Ilsley Bank Stock Corporation heretofore approved by the Board would then have to be *reviewed de novo* pursuant to the new rule of substantive law promulgated by the 1966 amendment to the Bank Holding Company Act of 1956. Incidentally, this substantive rule of law is identical with that in the Bank Merger Act of 1966. With respect to any future acquisitions by Marshall & Ilsley Bank Stock Corporation, they must, to be consummated, be approved by the Board after testing them by the new rule of substantive law, and will be also subject to *review de novo* by the courts on application by the Department of Justice. (See Section 11(b) of Bank Holding Company Act of 1956, as amended, JS p. 53a.) There is no support in this record for the contention that this litigation is of "great and general importance", a jurisdictional prerequisite to an appeal under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 USC 29.

2. The United States District Court for the Eastern District of Wisconsin dismissed this action on June 15,

1966 on the basis of this Court's determination in *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), as to the Congressional intent in the enactment of the Bank Holding Company Act of 1956. While the trial court's opinion sets forth the legislative history evidencing said Congressional intent in great detail, it is merely cumulative support of the conclusion reached by this Court in the *Whitney Bank* case wherein this Court cited said legislative history at p. 420.

The Government now acknowledges (JS p. 13) that this Court held in the *Whitney Bank* case that the Board "had 'original exclusive jurisdiction'" at least as to some of the statutory standards prescribed by the Bank Holding Company Act of 1956. However, no attempt is made by the Government to demonstrate that Chief Judge Tehan erred in his decision in this case in relying upon and applying this Court's ruling in the *Whitney Bank* case and holding "* * * the jurisdictional question here presented has been decided by the Supreme Court in the *Whitney Bank* case". (JS p. 31a)

The jurisdictional determination of this Court in the *Whitney Bank* case and of the judgment of the United States District Court for the Eastern District of Wisconsin on June 15, 1966 in the instant case, was superseded on July 1, 1966 by said 1966 amendment of the Bank Holding Company Act of 1956.

In addition to the jurisdiction vested in the Board by the Bank Holding Company Act of 1956, the Clayton Act had vested in the Board the duty of enforcing Section 7 of the Clayton Act where applicable to banks, banking associations and trust companies. See Section 11 of the Clayton Act, 15 USC 21(a). Furthermore, this

Court expressly held that neither the 1950 amendment to the Clayton Act nor the Bank Merger Act of 1960 modified this antitrust jurisdiction of the Board as to bank stock acquisitions, although the Bank Merger Act of 1960 had done so as to the Board's judisdiction over bank mergers. See *United States v. Philadelphia National Bank,* 374 U.S. 321, at pp. 344-345, note 22, (1963).

With the approval of the Board, in which such dual jurisdiction is vested, the acquisition of the stock of Marshall & Ilsley Bank and of Northern Bank was consummated December 2, 1959, but only after a postponement at the request of the Department of Justice to permit it to investigate and review a possible violation of Section 7 of the Clayton Act if said bank stock acquisitions were consummated. Furthermore, said acquisitions were consummated only after review and advice by the Department of Justice that it had no objection to a proposed letter from the President of the proposed bank holding company to prospective stockholders of the holding company. A copy of that letter was received in evidence without objection as a part of Exhibit 128 (Tr. p. 1347) and contained the following statement:

> "You will recall from our letters of October 29 and November 12 that the Antitrust Division of the Department of Justice asked us to postpone the effectiveness of the exchange until the Division had an opportunity to study possible antitrust aspects of the transaction. We have furnished the data requested by the Antitrust Division of the Department of Justice and have had conferences with representatives of the Department. We have been advised that in view of the circumstances involved the Department of Justice will take no action to prevent consummation of the exchange of stocks of the two banks for stock of Bank Stock Corporation, and has no intention of attempting to set this aside after consummation."

Government counsel at the trial agreed "That we had no objection to the form of the letter." (Tr. p. 1357)

As to the acquisition of the stock of Bank of Commerce, the Department of Justice in two successive briefs filed with the Board opposed said acquisition as violative of Section 7 of the Clayton Act. The Board specifically rejected this contention stating: "* * * it is the Board's judgment that the acquisition would not result in a substantial lessening of competition or tend to create a monopoly." See relevant portion of the tentative Board decision dated December 29, 1960 in Appendix 1 of this Brief; see also portion of final decision dated January 25, 1961 in Appendix 2 of this Brief. Clearly the following statements in the "Jurisdictional Statement" are incomplete, if not incorrect:

> "* * * it [the Board] did not purport to apply Section 7 of the Clayton Act, * * *." (JS p. 4)

and

> "We note preliminarily that in approving the acquisitions involved here the Board did not purport to exercise any jurisdiction under Section 7." (JS p. 6)

Manifestly, the Department of Justice had ample notice and opportunity to present its opposition to each acquisition here involved on the ground that it would violate Section 7 of the Clayton Act,[1] and yet sought no review pursuant to Section 9 of the Bank Holding Company Act of 1956 (JS p. 51a) when its contention was rejected by the Board.

Nothing in the history of this litigation supports a contention that it is of "great and general importance" and the supersession on July 1, 1966 of the jurisdictional

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[1]See suggestions to the contrary, JS pp. 9, 11 and 12.

rule of the *Whitney Bank* case by the 1966 amendment of the Bank Holding Act of 1956 negates such a contention.

CONCLUSION

In view of the foregoing, the Appellees' Motion to Dismiss or Affirm should be granted.

Respectfully submitted,

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APPENDIX 1

Portion of the TENTATIVE STATEMENT of the Board of Governors of the Federal Reserve System in "APPLICATION BY BANK STOCK CORPORATION OF MILWAUKEE, MILWAUKEE, WISCONSIN, FOR PRIOR APPROVAL OF ACQUISITION OF SHARES OF THE BANK OF COMMERCE, MILWAUKEE, WISCONSIN" published in the Federal Register on January 5, 1961 (26 Federal Register 56)

"Careful consideration has been given to statements filed by the Department of Justice in which it is urged that the application should be denied on the ground that there is a reasonable probability that the proposed acquisition may substantially lessen competition in violation of section 7 of the Clayton Act. However, for the reasons heretofore indicated, it is the Board's judgment that the acquisition would not result in a substantial lessening of competition or tend to create a monopoly."

APPENDIX 2

Portion of STATEMENT of the Board of Governors of the Federal Reserve System in "APPLICATION BY BANK STOCK CORPORATION OF MILWAUKEE, MILWAUKEE, WISCONSIN, FOR PRIOR APPROVAL OF ACQUISITION OF SHARES OF THE BANK OF COMMERCE, MILWAUKEE, WISCONSIN", published in the Federal Reserve Bulletin February, 1961, page 162.

"*Conclusion.*—As noted in the Board's Tentative Statement in this matter, issued in connection with the Notice of Tentative Decision published in the Federal Register on January 5, 1961 (26 Federal Register 56), careful consideration was given to statements filed by the Department of Justice urging denial of this application on the ground that a reasonable probability exists that the proposed acquisition may substantially lessen competition in violation of section 7 of the Clayton Act. Subsequent to the publication of the Board's Notice of Tentative Decision, the Department of Justice filed a further statement urging the Board to reconsider its tentative decision, and to deny the application for the reasons set forth in the previous statements submitted by that Department. The Board, having carefully reconsidered its decision in the light of the objections submitted by the Department of Justice, as well as all relevant facts of record, continues in its judgment that, in the light of the general purposes of the Act and the factors enumerated in section 3(c) thereof, the proposed acquisition would be consistent with the statutory objectives and the public interest and that the application should be approved."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

UNITED STATES *v.* MARSHALL & ILSLEY BANK STOCK CORP ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 1017. Decided May 22, 1967.

PER CURIAM.

The judgment is reversed. Section 11 (e) of the Bank Holding Company Act of 1966, 80 Stat. 236; *United States* v. *First City National Bank of Houston*, 386 U. S. 361.